

THE HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

REX - REAL ESTATE EXCHANGE, INC.,
Plaintiff,
v.
ZILLOW, INC., et al.,
Defendants.

Case No. 2:21-CV-00312-TSZ

**JOINT REPORT ON MEET AND
CONFER**

Plaintiff REX - Real Estate Exchange, Inc. (“REX”), Defendants Zillow Inc., Zillow Group, Inc., Zillow Homes, Inc., Zillow Listing Services, Inc., and Trulia, LLC (collectively, “Zillow”), and Defendant National Association of REALTORS® (“NAR”), by and through their attorneys, respectfully submit this joint report on a meet and confer held on January 24, 2023.

Pursuant to the Court’s January 11, 2023 Order, Dkt. No. 247, the parties met and conferred on a post-close of discovery schedule, including a trial date, and resolution of the pending motions. Attached hereto as Ex. A is a joint chart containing the parties’ respective scheduling proposals. Exhibits B and C are the parties’ respective summaries of their meet and confer.

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2:21-CV-00312-TSZ

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DATED: January 30, 2023.

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/s/ John “Jay” Jurata, Jr.

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****Pursuant to this Court's Electronic Filing
Procedure III L, the electronic signatory has
obtained approval from all other signatories.**

Exhibit A

Event	DEADLINES Set by the Court on January 11, 2023 through Close of Fact Discovery	REX's Proposal	Defendants' Proposal
Status Conference (in person) <i>(Oral arguments on any pending motions including but not limited to the Motions to Compel)</i>	January 31, 2023 (1 p.m.); changed from January 26, 2023 at the direction of the Court	January 31, 2023 (1 p.m.)	January 31, 2023
Disclosure of Rebuttal Expert Testimony under FRCP 26(a)(2)(D)(ii)	April 26, 2023	April 26, 2023	April 26, 2023
Discovery Motions due <i>(shall be noted on the motion calendar no later than the 3rd Friday thereafter)</i>	May 4, 2023	May 4, 2023	May 4, 2023
Plaintiff's Limited Reply Expert Report	May 10, 2023	May 24, 2023 [For reply reports limited to responding to any and all arguments in Defendants' rebuttal reports.]	May 24, 2023
Discovery to be completed	May 26, 2023	June 9, 2023	June 15, 2023
Dispositive Motions <i>(shall be noted on the motion calendar by...)</i>		June 22, 2023	July 13, 2023
Motions related to Expert Witnesses		June 29, 2023	July 20, 2023
Response to Dispositive Motions		July 13, 2023	August 3, 2023
Response to Expert-related Motions		July 20, 2023	August 3, 2023

Replies ISO Dispositive Motions		July 28, 2023	August 24, 2023
Replies ISO Expert-related Motions		July 28, 2023	August 17, 2023
Settlement conference LCR 39.1(c)(2)		July 31, 2023	August 21, 2023
Mediation		August 30, 2023	By September 20, 2023
Letter of compliance re: mediation		September 4, 2023	September 27, 2023
LCR 16(h) Plaintiff's Pretrial Statement and LCR 32(e) Deposition Designations		August 8, 2023	October 17, 2023
LCR 16(i) Defendant's Pretrial Statement and LCR 32(e) Deposition Designations		August 18, 2023	October 27, 2023
Motions in <i>Limine</i> (shall be noted on the motion calendar no later than the Friday before the Pretrial Conference, see LCR 7(D)(4))		August 24, 2023	November 10, 2023
LCR 16(j) Review of Exhibits		August 29, 2023	Prior to November 6, 2023
LCR 16(k) Conference of Attorneys and LCR 32(e) counter designations of depositions		August 29, 2023	November 6, 2023
Pretrial Order due		September 8, 2023	November 16, 2023

Trial Briefs to be submitted		September 8, 2023	November 16, 2023
Proposed <i>Voir Dire</i> /Jury Instructions		September 8, 2023	November 16, 2023
Pretrial Conference		September 15, 2023	November 21, 2023
Delivery of trial exhibits to courtroom		September 15, 2023	December 1, 2023
JURY TRIAL DATE		September 18, 2023	December 4, 2023 or January 8, 2024

Exhibit B

REX'S Summary of the Parties' Meet and Confer

Following this Court's January 11, 2023 order directing the parties to meet and confer about the schedule, counsel for REX emailed defense counsel the next day to schedule a meet and confer. On January 16, 2023, counsel for REX sent a letter to defense counsel and a proposed schedule and asked when defense counsel was available to discuss the proposal in the letter. On January 20, 2023, Counsel for REX sent yet another emailing seeking to meet and confer. Finally, the parties met on January 24, 2023.

In REX's letter and attached proposed schedule, REX proposed a September 18, 2023 trial date, which is about three-and-one-half months after the prior June 5, 2023 trial date, and consistent with the Court's decision to extend discovery from February 3, 2023 until May 26, 2023, or by a little less than four months. In its letter, REX also made a proposal to resolve all three pending motions, including through substantial concessions by REX.

REX took the positions it did because we heard loud and clear the message the Court delivered in its January 11, 2023 Order. We understand that as the Plaintiff REX has an obligation to keep this case moving and get it ready for trial. We accept that Defendants have a due process right to have adequate time to analyze REX's production, respond to REX's expert reports, and take the depositions to which they are entitled. Accordingly, despite the harm caused to REX by nearly a four-month extension of discovery, REX proposed a trial date that maintained almost all the intervals in this Court's September 26, 2022 Order. REX's proposal did not shorten the time from completion of summary judgment briefing to the deadline for motions *in limine* or the proposed trial date. REX tightened from four weeks to two weeks the time between the close of discovery and the deadline for dispositive motions to build in time for REX to submit reply reports, responding to issues raised in Defendants' rebuttal reports.

Defendants do not object to REX's serving such expert reply reports, but do object to tightening the time between the close of discovery and the deadline for summary judgment motions, as well as REX's proposed September 18, 2023 trial date, proposing instead a trial date in December 2023 or January 2024, which would be six to seven months after the previous trial date of June 5, 2023. REX will be prepared to discuss the reasons for its proposal and the basis for its objections to Defendants' counter proposal at the status conference on January 31, 2023.

Separately, we understand that this Court is frustrated with having to adjudicate discovery disputes between the parties when those disputes do not go the core issues in the case. Accordingly, we proposed a resolution of all three pending motions to take them off this Court's docket. Even though REX feels strongly that its position on all three motions is justified under the law and facts, we proposed a package deal including an agreement on the schedule and on expert reply reports pursuant to which: (1) REX would produce its consultant's damage analysis, which is the sole remaining issue in NAR's motion to compel at Dkt. No. 228 because REX stated in its opposition that it is not claiming privilege with respect to communications with the firm retained by a Special Litigation Committee to investigate a so-called whistleblower complaint; (2) REX would produce for one additional hour a Rule 30(b)(6) witness on four specified topics without it counting against Defendants' deposition limit in response to Zillow's motion to compel at Dkt. No. 201; and (3) NAR would run the search that is the subject of REX's motion to compel at Dkt. No. 196 and promptly produce the responsive, non-privileged documents.

Unfortunately, despite REX's best efforts to resolve those motions, all three motions remain pending as does the parties' dispute about the schedule following the close of discovery, including when this case should be set for trial.

Exhibit C

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REX - REAL ESTATE EXCHANGE,
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DEFENDANTS' STATEMENT

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1 **I. DEFENDANTS' STATEMENT**

2 **A. PROPOSED PRETRIAL SCHEDULE**

3 The Defendants' proposed pretrial schedule is attached as Exhibit A. REX has requested
 4 an additional two weeks for it to submit "complete" rather than "limited" reply expert reports.
 5 Defendants have agreed to include Plaintiff's requested additional time in the proposed schedule.
 6 But while Defendants do not object to REX's request to expand the time for and scope of reply
 7 expert reports, that request does make REX's simultaneous attempt to truncate the case schedule
 8 untenable.

9 Defendants' propose a trial date of December 2023/January 2024 for two reasons. First,
 10 Defendants' proposed trial date allows sufficient time for summary judgment. As the Court is
 11 aware, Plaintiff recently materially changed its alleged theory of harm in this action. This change
 12 has important implications for summary judgment, given the new additions that were not present
 13 during Rule 12(b)(6) briefing. The additional time following summary judgment allows the
 14 parties to get the benefit of the Court's ruling before expending resources on issues that
 15 ultimately may be narrowed, removed from the case or resolved with the benefit of the Court's
 16 guidance. A brief extension of time between Rule 56 motions and trial will not have any
 17 detrimental impact on REX, which is no longer a going concern.

18 Second, NAR's counsel and NAR itself have previously scheduled trials in September
 19 and October 2023. *Burnett v. NAR*, No. 4:19-cv-00332 (W.D. Mo.), has a trial scheduled to
 20 begin on October 16, 2023, and to last more than three weeks. That trial—which will address
 21 MLS rules—will involve the same NAR in-house counsel, witnesses, and trial counsel as this
 22 case. In addition, *In re Broiler Chicken Antitrust Litigation*, No. 1:16-cv-08637 (N.D. Ill.), has
 23 a trial scheduled to begin on September 11, 2023, which will involve NAR's counsel.

24 Plaintiff's schedule sets trial for September 18, 2023. This proposed trial date requires a
 25 dispositive motion deadline that falls only four weeks after receipt of Plaintiff's reply expert
 26 reports, and two weeks after the close of discovery. Defendants cannot agree to Plaintiff's
 27 proposed trial date because it allows for approximately ten days between the end of Rule 56
 28

1 briefing and the deadline for Plaintiff's pretrial statement. It is inefficient to set deadlines for
2 pretrial submissions that will likely come before the parties receive the Court's guidance on
3 issues and expert testimony to be considered at trial.

4 **B. THE PENDING MOTIONS**

5 Defendants appreciate that Plaintiffs have offered compromise proposals regarding the
6 pending motions. However, those proposals do not resolve the motions pending against REX.

7 Regarding Zillow Defendants' Motion to Compel Additional Fed. R. Civ. P. 30(B)(6)
8 Testimony (ECF 201), REX's proposed one-hour deposition on four narrow topics will not allow
9 an accurate assessment of whether the documents created by REX at moments in time critical to
10 its allegations were produced in their original form, or whether those documents were deleted
11 after the litigation hold was issued. But to avoid further wasting the Court's time on these issues,
12 Zillow Defendants proposed a two-hour, in-person deposition with an adequately prepared
13 designee on an expanded list of topics. Plaintiff rejected that counterproposal.

14 NAR's pending motion to compel (ECF 228) seeks documents REX improperly
15 withheld due to privilege. REX has conceded certain aspects of the motion and offered a
16 compromise about other aspects. But REX has neither confirmed it produced all documents for
17 which it has withdrawn its privilege claim nor offered to produce all information NAR seeks in
18 the motion. REX filed a motion to compel NAR to run an electronic search (ECF 196). Since
19 that motion was briefed, NAR has substantially completed its document production, and REX
20 has taken the position that it can request the same search under paragraph C.2.b. of the ESI Order
21 (ECF 113). NAR therefore believes REX's motion to compel is moot.

22 Defendants requested that the parties exchange submissions before filing but REX did
23 not agree. Accordingly, Defendants are making this submission without having reviewed
24 REX's.

Respectfully submitted this 30th day of January 2023.

Dated: January 30, 2023

By: /s/ Aravind Swaminathan

/s/ Nicole Tadano

/s/ John "Jay" Jurata, Jr.

/s/ Russell P. Cohen

/s/ Naomi J. Scotten

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